

1991

# Constitutional Values in the Private Sector Workplace

Joseph R. Grodin

*UC Hastings College of the Law*, [grodinj@uchastings.edu](mailto:grodinj@uchastings.edu)

Follow this and additional works at: [http://repository.uchastings.edu/faculty\\_scholarship](http://repository.uchastings.edu/faculty_scholarship)



Part of the [Labor and Employment Law Commons](#)

---

## Recommended Citation

Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 *Indus. Rel. L.J.* 1 (1991).

Available at: [http://repository.uchastings.edu/faculty\\_scholarship/200](http://repository.uchastings.edu/faculty_scholarship/200)

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact [marcusc@uchastings.edu](mailto:marcusc@uchastings.edu).



## **Faculty Publications**

### **UC Hastings College of the Law Library**

**Author:** Joseph R. Grodin

**Source:** Industrial Relations

**Citation:** 13 Indus. Rel. 1 (1991).

**Title:** *Constitutional Values in the Private Sector Workplace*

Originally published in INDUSTRIAL RELATIONS . This article is reprinted with permission from INDUSTRIAL RELATIONS and University of California, Berkeley Institute for Research on Labor and Employment.

## Constitutional Values In The Private Sector Workplace

Joseph R. Grodin†

*Under the classical model of the workplace, the employer's ownership of the enterprise was thought to carry with it not only general authority to control the workplace and direct the workforce but power to make employment contingent upon whatever conditions the employer might consider appropriate. In this article, Professor Grodin chronicles the movement from the classical model to one which protects the values which our federal and state constitutions protect in the community at large. The author discusses the source of these changing values in the workplace, including the National Labor Relations Act and collective bargaining, unions, and the application of federal and state constitutional principles. Professor Grodin argues for the expansion of these values, using as doctrinal alternatives freedom of expression and association, privileges and immunities, privacy, equal protection and due process principles.*

INTRODUCTION .....	2
I. THE CLASSICAL VIEW OF THE EMPLOYMENT RELATIONSHIP .....	4
II. THE SOURCE OF CONSTITUTIONAL VALUES IN THE EMPLOYMENT RELATIONSHIP .....	7
A. <i>The National Labor Relations Act and the Institution of         Collective Bargaining</i> .....	7
B. <i>The Analogy of the Union-Member Relationship</i> .....	10

---

† Professor of Law, University of California, Hastings College of Law; B.A. 1951, University of California, Berkeley; J.D. 1954, Yale Law School; Ph.D. 1960, University of London. The author has served as a union lawyer, as a labor arbitrator, as a member of California's first Agricultural Labor Relations Board (1975), and as a Justice of the California Court of Appeal (1979-82) and California Supreme Court (1982-87). The author wishes to acknowledge his debt to the Rockefeller Foundation for logistical and inspirational support provided at its Bellagio Study and Conference Center, and to various people who have been kind enough to read and comment on previous drafts. These include Benjamin Aaron, James Atleson, David Faigman, Alvin Goldman, Louis Schwartz, Clyde Summers, and Scott Sundby. A version of this article was presented at the Annual Benjamin Aaron Lecture Series at UCLA in January, 1991.

C. <i>The Analogy of Public Employees</i> .....	13
III. DOCTRINES AND PATTERNS OF REGULATION .....	16
A. <i>Privileges and Immunities of Citizens</i> .....	17
B. <i>Freedom of Expression and Association</i> .....	18
C. <i>Privacy</i> .....	25
D. <i>Equal Treatment</i> .....	32
E. <i>Due Process</i> .....	35
CONCLUSION .....	37

## INTRODUCTION

It has been obvious for some time now that American law relating to the workplace and the public policy it reflects are undergoing substantial, even radical, change. It was, after all, only 20 years ago that Derek Bok wrote that the distinguishing characteristic of American labor law was that it eschewed government regulation and relied primarily upon collective bargaining to control the excesses of the marketplace as it affects the employment relationship.<sup>1</sup> Since then union organization and power have declined steadily and dramatically.<sup>2</sup> At the same time, a veritable garden of legislative, administrative, and judicial activity has blossomed at both federal and state levels aimed at protecting directly, rather than through bargaining, what are considered the legitimate expectations and interests of American workers.<sup>3</sup> The result is a strikingly different landscape of workplace governance than the one Bok painted—a landscape in which, for most of the workforce, government regulation is emerging as the predominant feature.

A number of factors—institutional, political, legal, and economic—have no doubt contributed to these changes, and I do not propose here to join the debate over their relative significance.<sup>4</sup> Rather, I intend to focus

1. Derek Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971).

2. From the mid-fifties to the mid-eighties, the unionized share of the private sector work force declined from about 40% to about 15%. The somewhat varying statistical estimates are discussed in Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1 (1986). For discussion of the factors contributing to the decline, see Harry S. Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915 (Nov. 13, 1987); Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. ECON. PERSP. 63 (1988).

3. A partial listing of the most recent and most important federal employment legislation includes the Occupational Health and Safety Act of 1970, 29 U.S.C.A. §§ 651-678 (1985 & Supp. 1991); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-796 (1985 & Supp. 1991); the Employee Retirement and Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461 (1985 & Supp. 1991); the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988); the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109 (1988); the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (1991); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988); the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-634 (1985 & Supp. 1991).

4. Among the factors arguably responsible for the decline in unionization are: a shift in the

upon the developing pattern of regulation and upon the view of the employment relationship which that pattern appears to reflect.

Simply put, it is my thesis that a substantial part of the pattern of regulation can usefully be understood as a bringing of constitutional values to the private sector workplace, and that as a result there is an emerging picture of the employment relationship as one in which workers have rights that are analogous in some significant respects to the kinds of rights that citizens enjoy within the political community.<sup>5</sup>

When I speak of importing constitutional values to the private sector workplace, I do not mean only, or even primarily, the direct application of constitutional provisions without regard to state action. While that may be an available alternative under some state constitutions,<sup>6</sup> constitutional *values*, whether or not explicitly identified as such, are finding their way to the workplace through both legislation and common law doctrine. What I offer is a paradigm—a way of looking at developments in workplace regulation—which I suggest is useful both in understanding those developments and in predicting the pattern of employment law that may lie ahead. My thesis is intended to be both descriptive and

---

nature of the workforce from blue collar to white collar; an increase in employer resistance to unions; a legal climate supportive of employer resistance; attractive personnel policies offered by non-union employers; and rigidity within some unions. See PAUL C. WEILER, *GOVERNING THE WORKPLACE* 8-11, 108-14 (1990).

The explanation for the rise in legal regulation is also complex. As a former judge who contributed a bit to judicial activity on this front (see *Hentzel v. Singer*, 188 Cal. Rptr. 159 (1982) (discharge of employee for complaining of smoking by co-worker violated public policy); *Pugh v. See's Candies*, 171 Cal. Rptr. 917 (1981) (implied promise of continued employment modifies at-will presumption)), it seems to me likely that there is a relationship to the vacuum created by the decline in unionism. Title VII of the Civil Rights Act of 1964 undoubtedly played a catalytic role, as did the changes in expectations stimulated by employer regularization of disciplinary procedures. See Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733 (1986). Perhaps also the examples set by our European and Canadian economic competitors have had some influence. See Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985).

It has been suggested that the rise in legal regulation may itself be contributing to the decline of union organization, by removing some of the incentive for joining a union. See, e.g., Jane B. Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After Lingle v. Norge Division of Magic Chef, Inc.*, 41 HASTINGS L.J. 1149, 1176-78 (1990). The AFL-CIO, however, supports legislation that would require just cause for dismissal, and not only for altruistic motives; some union leaders see in legal regulation of the workplace an opportunity to gain a foothold among nonunion employees by providing them with representation.

For a creative discussion of the relationship between unions and employment law, see Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

5. After beginning work on this article I discovered that Clyde Summers had advanced a similar thesis. Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689 (1986). Cogent as always, Professor Summers focuses principally upon the constitutional values implicit in the National Labor Relations Act and other labor legislation, though he also anticipates some of my analysis with respect to common law adjudication. *Id.* at 720-22. In retrospect, it would be fair to characterize this article as an elaboration of the thesis advanced by Professor Summers.

6. See *infra* notes 133-36 and accompanying text.

predictive.<sup>7</sup>

My thesis has a normative aspect as well. As a former union lawyer, I grieve over the decline in union organization and regret the extent to which it has become necessary to rely upon legal regulation of the workplace to protect workers' interests. Indeed, I have serious doubts regarding the ability of the law to protect those interests without the kind of support that a well-organized union can provide. Moreover, the pattern of regulation that has so far emerged presents a rather narrow vision of constitutional values. I would strongly prefer a vision that includes some form of participatory democracy,<sup>8</sup> rather than one that focuses primarily (as does current employment law) upon the protection of rights. Nonetheless, I welcome the developments that have occurred and advocate the paradigm I describe. It reflects, I believe, the kind of moral claim that a worker is entitled to make as a member of a community.<sup>9</sup>

## I

### THE CLASSICAL VIEW OF THE EMPLOYMENT RELATIONSHIP

Some time ago I gave a playful talk to a group of labor and employment lawyers in which I took *Billy Budd* as my central theme. Herman Melville's intriguing novella has been the subject of countless interpretations—as a saga of innocence in the face of evil, as a religious parable, or as a political allegory, among others—but I suggested (with tongue partly in cheek) that it could more properly be understood as an allegory about the employment relationship. Billy the sailor is physically conscripted to serve—a metaphor suggesting the constraints of economic necessity which often remove meaningful choice for a worker in search of a job. Billy's boss, Captain Vere, is generally decent, humane, and understanding. Billy has the bad fortune, however, to run afoul of a supervisor, one Claggart, who has his own dark agenda. When Claggart falsely accuses Billy of encouraging mutiny, Billy strikes out in frustration and anger, causing Claggart to take a fatal fall on the deck. Vere knows the killing was unintentional, he knows that Claggart was a scoundrel, and he knows that Billy's response was provoked. Nevertheless, acting from the principle that authority must be upheld, Vere convenes a "trial" in which he is the prosecutor, judge, and jury. And, invoking an unnecessarily severe interpretation of applicable rules, he issues an order that in-

---

7. The descriptive value of my thesis, in terms of the totality of current employment law, is obviously limited by the fact that there is a good deal of regulation—OSHA, for example—that escapes the constitutional analogy. Workplace safety, while important, cannot meaningfully be characterized as a value of constitutional dimension under current doctrine.

8. See *infra* page 37.

9. See *infra* pp. 5-6.

verts the oft-cited arbitral characterization of dismissal as the industrial equivalent of capital punishment: he orders Billy's execution.

This reading of *Billy Budd* may not be exactly what Melville had in mind, but it does offer a powerful (if somewhat extravagant) paradigm of the classic authoritarian view of the "master-servant" relationship. An employer's ownership of the enterprise was formerly thought to carry with it not only the general authority to control the workplace and direct the work force, but also the power to make employment contingent upon whatever conditions the employer might consider appropriate, no matter how deeply these conditions may intrude upon the autonomy, privacy, dignity, or other interests of the worker, and without regard to whether the conditions served any demonstrated business interest.<sup>10</sup> The classical view was sometimes premised upon the employer's property rights, and at other times, ironically, upon ostensible concern for the employee's liberty and freedom of contract.<sup>11</sup> So entrenched was this notion of presumptive authority that attempts by society to protect against its abuses were deemed unconstitutional,<sup>12</sup> and attempts by workers to organize and exert countervailing power were deemed unlawful.<sup>13</sup>

To the modern eye (or, I suppose I should say, to most modern eyes), the classical model of the employment relationship appears anachronistic and unjust.<sup>14</sup> It ignored almost completely the worker's own investment in the enterprise of time and self—an investment surely as significant as that of the transient shareholder or manager. It ignored the reality of economic constraints which typically render the notion of contractual freedom on the part of the worker more fiction than fact. Perhaps most importantly, it ignored the significance of the workplace as a community in the life of the worker. By allowing the worker to be treated as an object in the workplace, the law tolerated denial of those values which, in the polity, it cherished.

---

10. The Supreme Court of Tennessee gave the best summary of the classic position in *Payne v. Western & A.R.R.*, 81 Tenn. 507 (1884). In *Payne*, the Court upheld the right of an employer to insist that his employees refrain from trading with certain merchants. It stated:

If the service is terminable at the option of either party [as the court held it was] it is plain no action would lie even to the employee; for either party may terminate the service, for any cause, good or bad, or without cause. . . . [P]ower is inherent in size and strength and wealth; and the law cannot set bound to it, unless it is exercised illegally.

*Id.* at 517, 519.

11. The paradigm case is, of course, *Lochner v. New York*, 198 U.S. 45 (1905).

12. *Id.*

13. See, e.g., *Philadelphia Cordwainers Case* (1806), 3 Commons & Gilmore, Doc. Hist. Am. Soc. 59-248. See generally CHARLES O. GREGORY, *LABOR AND THE LAW* (1958).

14. There are, however, those who, on the basis of economic efficiency, argue that the classical view is best for all concerned. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Jeffrey L. Harrison, *The "New" Terminable-At-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984). For a critique of that position from an economic perspective, see Steven L. Wilborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101 (1988).

While elements of the classical model remain, it has been substantially eroded by modern social and legal developments. Employers have moved away from it through personnel policies that include such items as seniority rules, internal promotion practices, and disciplinary and grievance procedures. The existence of these policies, while promoting loyalty and productivity, undoubtedly also generates an atmosphere of expectation on the part of the employees that is at odds with outdated notions of absolute employer authority.<sup>15</sup> The law has moved away from the classical model in the direction of protecting within the workplace community those values which our constitutions protect in the community at large.

I do not mean to suggest, of course, that the law has ignored, or should ignore, the very substantial interest of employers and the general public in maintaining productivity and efficiency, any more than the recognition of individual constitutional rights requires the law to blind itself to the interests of the community. But if the accommodation between competing interests is to be described in terms of a balance, the constitutional model suggests that it is a balance which places upon the employer a burden of justifying, in terms of business needs, significant intrusions upon protected rights.<sup>16</sup>

Nor do I intend to minimize the significance of the procedures by which this accommodation is or ought to be made. Whether constitutional values are brought to the workplace through statute or through common law development, whether they are implemented by courts, administrative agencies or arbitrators, whether remedies for violation are limited to the traditional reinstatement with back pay or include emotional or punitive damages—these are all matters which are obviously of great importance to all concerned.<sup>17</sup> They are not, however, the focus of this article.

---

15. For a description of these trends, see ROBERT HOWARD, *BRAVE NEW WORKPLACE* (1985); SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945* (1985); Finkin, *supra* note 4.

16. The requirement that intrusions upon protected rights be justified in terms of business needs is a continuing theme in American employment law. It appears in the early cases applying Section 8(a)(1) of the National Labor Relations Act (*see infra* note 22 and accompanying text), reappears in disparate impact analysis under Title VII of the Civil Rights Act of 1964, and is evidenced in especially strong form in the requirements for accommodation contained in the recent Americans With Disabilities Act of 1990, 42 U.S.C.S. § 12111(9) (Law. Co-op. Supp. Feb. 1991). In some European countries, the requirement is applied as a general principle. *See, e.g., C. TRAV. Art. L. 122-35* (1988) (requiring that any personnel rule restricting the rights of persons and the liberties of unions be justified by the nature of the work and proportional to the end sought).

17. My own view is that there should be a statutory scheme administered either by an agency or through arbitration, which protects against dismissal of employees without just cause. *See* Joseph R. Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135 (1990).



## II

THE SOURCE OF CONSTITUTIONAL VALUES IN THE  
EMPLOYMENT RELATIONSHIP

The proposition that constitutional values are relevant to the workplace is not new. Prior to the development of modern employment law, such values were reflected in a variety of legal norms and institutions: through the National Labor Relations Act and the institution of collective bargaining, through unions and their legal relationship to members, and through the application of federal constitutional principles to the public sector. A review of the role that constitutional values have played in those three arenas is essential to a full understanding of the current legal situation.

A. *The National Labor Relations Act and the Institution  
of Collective Bargaining*

The democratic ideal of participation by workers in a form of industrial governance lies at the heart of traditional labor policy. Under the philosophy of the National Labor Relations Act, unions, freely chosen by a majority of workers in an appropriate unit, were to be the organs through which workers could express their view regarding governance of the workplace.<sup>18</sup> Collective bargaining was the legislative-like vehicle through which that expression would be manifested.<sup>19</sup> To buttress this framework the statute protected from employer interference the rights of workers to associate for the purpose of improving wages and conditions of employment and to communicate with one another and with the employer toward that end.<sup>20</sup>

While employer property rights usually prevailed over the claims of non-employee organizers to enter and communicate with workers,<sup>21</sup> the

18. Senator Wagner, the principal author of the NLRA, argued in support of the statute that "we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood." Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 34 (1979) (citing N.Y. TIMES, April 13, 1937, at 20 col. 1).

19. "In annual conferences, the employer and the union representing the employees, in addition to fixing wage rates, write a basic statute for the government of an industry or plant." Archibald Cox, *Some Aspects of the Labor Management Relations Act 1947*, 61 HARV. L. REV. 1, 1 (1947).

20. Section 7 of the NLRA declares the general right of employees to form and join unions and to engage in concerted activities for mutual aid or protection. 29 U.S.C. § 157 (1988). Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. 29 U.S.C. § 158 (1988). Section 8(a)(3) prohibits employer discrimination to encourage or discourage union membership. 29 U.S.C. § 158 (1988).

21. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (non-employee organizers granted limited access where the location of the plant or the living quarters of the employees placed them beyond reach of reasonable union efforts to communicate with the employees). Cf. *Lechmere v. NLRB*, 112 S. Ct. 841 (1992) (rejecting NLRB balancing test in favor of strict property right approach).

NLRB and the courts construed the NLRA to require employers to justify restrictions upon communications by workers during their non-working time.<sup>22</sup> The scope of statutory protection was later extended to communications regarding political issues which had some arguable impact upon wages and conditions of employment.<sup>23</sup> During nonwork time and in nonwork areas, the workplace became a public forum.

Traditional labor policy focused more upon process than substance. It established the framework for collective bargaining, but refrained (with minor exceptions) from regulating the outcome. Thus, to the extent that the NLRA was a charter for workplace democracy, it was a constitution with a quite limited bill of rights.<sup>24</sup>

The creativity of the arbitration process, however, largely made up for that deficit. Collective bargaining agreements typically required "just cause" (or something like it) for disciplinary action, and within that rubric there evolved a kind of common law consensus among arbitrators as to certain propositions. This consensus included, for example, the conviction that discipline should be progressive so that a worker might be made aware of his perceived faults and be granted opportunity to correct them, the worker should have notice of and opportunity to respond to charges of specific wrongdoing, workers similarly situated should be treated equally, discipline should not be imposed for conduct off the job unless it could be shown to affect the job, and employers ought not intrude upon employee privacy without offsetting justification.

More broadly, arbitrators inferred from the nature of the bargaining relationship the principle that rules which an employer promulgated for the workplace had to be "reasonable" in terms of the employee and employer interests affected.<sup>25</sup> While these principles were theoretically subordinate to the collective agreement and therefore subject to modification or negation through bargaining, the parties almost always accepted such arbitral outcomes. The system of rights that emerged from the arbitration process thus bore considerable resemblance to the constitutional rights of citizens within the state. In fact, arbitrators sometimes made

---

22. This is the general rule with respect to non-discriminatorily motivated limitations on union organizing. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (employer rule prohibiting union solicitation by an employee outside of working hours is presumed invalid in the absence of evidence that "special circumstances make the rule necessary in order to maintain production or discipline").

23. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (distribution of union newsletter calling upon workers to oppose a state right-to-work proposal and a presidential veto of a minimum wage bill protected by Section 7 NLRA).

24. For development of this thesis see Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 *INDUS. REL. L.J.* 483, 486-93 (1981).

25. For discussion of these arbitral principles, see FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 553-55 (4th ed. 1985 & Supp. 1988); ADOLPH M. KOVEN & SUSAN L. SMITH, *JUST CAUSE: THE SEVEN TESTS* 72-75 (1985).

explicit reference to constitutional values in their decisions.<sup>26</sup>

In some significant respects the NLRA has fallen short of its original aspirations.<sup>27</sup> The NLRB and the courts have taken a cramped view of the bargaining process, while at the same time their rulings have facilitated employer efforts to keep unions away from their doors.<sup>28</sup> Nonetheless, where collective bargaining exists it continues to provide a powerful democratic alternative to the authoritarian model.

Both the statute and collective bargaining, moreover, have an impact beyond the organized sector. The NLRA has been construed to protect unorganized workers who engage in group-oriented activity related to wages or working conditions.<sup>29</sup> The very existence of collective bargaining, together with the threat of its extension, strongly influences the behavior of non-union employers, inducing them to institute procedures, such as internal grievance procedures, which might not otherwise exist.<sup>30</sup> In addition, the pattern of arbitral decisions in the protection of individual rights is bound to affect how employment law develops outside the collective bargaining sphere, especially as the concept of just cause expands through statute<sup>31</sup> and common law developments.<sup>32</sup>

26. See *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 204 n.12 (D. Conn. 1974) (dictum) (Lombard, J.), *aff'd in part and rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). For discussion of arbitral decisions in relation to constitutional themes, see, for example, Joseph J. Allotta & Larry D. Farley, *Application of the Exclusionary Rule to Arbitration Procedures*, 37 LAB. L.J. 323 (1986); I.B. Helburn & John R. Hill, *The Arbitration of Religious Practice Grievances*, 39 ARB. J., June 1984, at 3; Dana C. Palmer, *Free Speech and Arbitration: Implications for the Future*, 27 LAB. L.J. 287 (1976).

27. For development of this theme, see Atleson, *The Prospects for Labor Law Reform*, 18 POL'Y STUD. J. 364 (1989-1990).

28. For a recent critique along these lines, see Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988).

29. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (discharge of unorganized employees for work stoppage staged to protest lack of adequate heating in the workplace violated NLRA). What is required for activity to qualify as "concerted" and therefore protected has been a matter of ongoing controversy. Compare *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984) (employee who invoked contract clause as basis for refusal to work was engaged in concerted activity) with *Meyers Indus.*, 281 N.L.R.B. 882 (1986) (individual employee who invoked statute as basis for refusal to work was not engaged in concerted activity), *review denied*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

30. See, e.g., DAVID W. EWING, *FREEDOM INSIDE THE ORGANIZATION* (1977).

31. So far, Montana is the only state with legislation requiring just cause for dismissal. MONT. CODE ANN. § 39-2-94(2) (1991). The National Conference of Commissioners on Uniform State Laws has approved an "Employment Termination Act" which would have that general effect. A comment to the Act's definition of "good cause" reads:

In the determination of good cause, principles and considerations generally accepted in arbitration which are to be applied include such factors as the reasonableness of the company rule violated, the employee's knowledge or warning of rule, the consistency of enforcement of the rule and the penalties assessed, the use of corrective or progressive discipline, the fullness and fairness of the investigation including the opportunity given the employee to present his or her views prior to dismissal, and the appropriateness of the penalty in light of the conduct involved and the employee's employment record.

For the text of the Act, see 9A LAB. REL. REP. (INDIVIDUAL EMPLOYEE RTS. MANUAL) (BNA) 540:21-45 (December 1991).

Yet, given the decline in union organization and the numerous obstacles which confront the extension of collective bargaining, realism requires the recognition that if the bulk of the work force is to have any protection for constitutional values, that protection will have to come from the state. That recognition underlies current developments in employment law.

### *B. The Analogy of the Union-Member Relationship*

Early developments in the law relating to the union-member relationship also bear implications for the constitutional model. The union-member relationship, like the employment relationship, was traditionally viewed as "private" and therefore governed only by internal rules. Those rules came to be viewed, however, as a kind of judicially enforceable contract among members, or between the union and each member.<sup>33</sup> Over time, courts came to infuse the relationship with certain presumptions that were derived from English notions of "natural justice", but which we would call due process: members were subject to discipline only for reasons provided in the rules, and only by a process that included notice and a hearing which permitted confrontation and opportunity to respond.<sup>34</sup>

As in the case of the employment relationship, the contract metaphor was largely a fiction. The principle of exclusive representation, the prevalence of union security arrangements, and the practical obstacles to amendment of union rules all left scant room for meaningful choice on the part of individual workers, either with respect to whether they would belong to a union or as to which union they would join. Accordingly, the law acted to produce a quid pro quo in the form of a duty of fair representation, which required unions to represent their members fairly in the negotiation and administration of agreements.<sup>35</sup> Later legislative author-

---

32. The express or implied terms of an individual contract of employment may be found to contain a promise not to dismiss the employee except for cause. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (1988).

33. JOSEPH R. GRODIN, *UNION GOVERNMENT AND THE LAW: BRITISH AND AMERICAN EXPERIENCES* 64-69 (Institute of Industrial Relations 1961).

34. On these developments generally, see GRODIN, *supra* note 33 at 96; Clyde W. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951). One of the early English cases demonstrating this trend is *Innes v. Wylie*, 1 Car. & K. 257 (Q.B. 1844) (holding a member's expulsion from the Caledonian Club invalid for lack of notice or hearing). Lord Denman, C.J. reasoned that such requirements inhered "in the nature of a judicial proceeding." *Id.* at 263. This principle came to be extended to professional societies, friendly societies, and trade unions, and was expanded to include the right to an unbiased tribunal acting in "good faith." See GRODIN, *supra* note 33, at 101-02.

35. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (union required to represent non-union and minority union members fairly, impartially, and in good faith); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944) (unfair labor practice where employer executed closed shop agreement with union knowing that membership would be denied to employees because of former affiliation with another union).

ization of union security engendered a further principle: the right of dissident members to object to the expenditure of their dues for political or ideological purposes with which they disagreed.<sup>36</sup> At common law, the reality of union power in relation to their members led courts dealing with union rules to supplement the techniques of interpretation and implication with outright invalidation of terms deemed contrary to public policy.<sup>37</sup>

It can be seen that this evolutionary process created a body of law that protected not only the procedural rights of union members in disciplinary cases, but certain substantive rights as well. These included the right to criticize union officials and policies without recrimination,<sup>38</sup> the right to participate in the governance of the organization without invidious discrimination,<sup>39</sup> and the right to exercise rights and responsibilities as citizens in the larger societies to which they belonged—for example, to petition governments,<sup>40</sup> to testify,<sup>41</sup> to exercise discretion as a public offi-

---

36. As in the case of the duty of fair representation, the principle was first established under the Railway Labor Act, as a matter of statutory interpretation against the backdrop of constitutional constraints. *Machinists v. Street*, 367 U.S. 740 (1961). Since then, the principle has acquired constitutional stature in its application to public employees. See, e.g., *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). It is also applied under the National Labor Relations Act. *Communications Workers v. Beck*, 487 U.S. 735 (1988).

37. As early as 1920, a New York court held that "both good conscience and law demand that no member shall be deprived of his rights and privileges [within a union] until he has had notice of the charges against him and been given opportunity to meet them." Because labor organizations had become "an integral part of our business life, and wield a powerful influence upon the everyday affairs of multitudes of our people", and because "the state is vitally interested in their welfare", a union rule purporting to dispense with notice prior to removal or suspension "must be held void as against public policy and utterly unenforceable." *Bricklayers' Union v. Bowen*, 183 N.Y.S. 855 (Sup. Ct. Eq. 1920), *aff'd*, 189 N.Y.S. 938 (App. Div. 1921). See also *Cason v. Glass Bottle Blowers Ass'n*, 231 P.2d 6 (Cal. 1951); *Mogelever v. Newark Newspaper Guild*, 194 A. 6 (N.J. Ch. 1937), *aff'd on other grounds*, 199 A. 56 (N.J. 1938); *Rodier v. Huddell*, 250 N.Y.S. 336 (App. Div. 1931).

38. One of the early cases was *Crossen v. Duffy*, 103 N.E.2d 769 (Ohio Ct. App. 1951), in which the court noted that the conduct for which members were disciplined fell "within the scope of free, if not fair, criticism and the free speech guaranteed by the United States Constitution and the Constitution of Ohio." In 1958 the New York Court of Appeals declared that "if there be any public policy touching the government of labor unions . . . it is that traditionally democratic means of improving their unions may be freely availed of by members without fear of harm or penalty." *Madden v. Atkins*, 151 N.E.2d 73 (N.Y. 1958).

39. The leading case is *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944), in which the court held that a union which controls access to jobs through a closed shop arrangement occupies a "quasi public position similar to that of a public service business and it has certain corresponding obligations", including the obligation not to exclude persons from full participation in union affairs on the basis of irrelevant factors such as race. In subsequent decisions the California Supreme Court broadened the *Marinship* rule to include instances of exclusion and discrimination for other reasons, and to situations in which the right to work was not an issue. See GRODIN, *supra* note 33, at 177-79.

40. *Spayd v. Ringing Rock Lodge*, 113 A. 70 (Pa. 1921) (union may not discipline member for signing a petition to the state legislature in opposition to a law which his union supported).

41. *Abdon v. Wallace*, 165 N.E. 68 (Ind. Ct. App. 1933) (union may not discipline member for testifying before a legislative committee that a certain railroad headlight, favored by his union, had particular disadvantages).

cial,<sup>42</sup> and to campaign for political office.<sup>43</sup> These safeguards were eventually codified in Title I ("Members' Bill of Rights") of the Labor Management Reporting and Disclosure Act (Landrum Griffin Act) of 1959.<sup>44</sup>

Having said this, I do not want to force the analogy between the union-member relationship and the employer-employee relationship. Some of the justifications advanced for legal protection of union members against the arbitrary exercise of union authority (for example, the fact that unions receive legal support for a quasi-monopolistic status as bargaining representative and the fact that they hold themselves out to be democratic institutions) do not apply to most employers.

But part of the justification for legal intervention lay in the *de facto* control which unions exert, through collective bargaining, over employment decisions such as promotion, termination, and recall from layoff, which vitally affect employees. These are matters over which the employer's control is far more pervasive and direct than that of the union. This suggests a certain incongruity in a legal system which prohibited *unions* from discriminating on the basis of race and other arbitrary factors and imposed upon *unions* the obligation to respect values such as freedom of speech and due process while leaving *employers* free of any such limitations. The elimination of that incongruity characterizes much of the history of employment law over the last several decades.

The development of legal protection for constitutional values in the union-member relationship also offers a guide to the proper roles of courts and legislatures in the implementation of public policy bearing upon employment. When it came to protecting members against their unions, courts did not hesitate to invoke creative theories and rely upon public policies that had not been clearly enunciated by statute.<sup>45</sup> The propriety of such action was generally acknowledged, even by union lawyers. Legislatures existed to reject or modify the judicial views, though in fact they tended more often to confirm.<sup>46</sup> Those courts willing to be similarly innovative in protecting constitutional values in the employer-employee relationship can find support in that experience.

---

42. *Schneider v. Local 6, United Ass'n of Journeymen Plumbers*, 40 So. 700 (La. 1905) (union may not discipline member for failure to obey his union's instructions to vote, as a member of municipal Board of Plumbing Examiners, for a particular person as plumbing inspector).

43. *Cf. Morgan v. Local 1150*, 16 L.R.R.M. 720 (Ill. Super. Ct. 1945) (union may not discipline member for campaigning for Republican candidates, contrary to the union's position in support of Democrats), *rev'd on other grounds*, 72 N.E.2d 59 (Ill. App. Ct. 1946).

44. 29 U.S.C. §§ 411-415 protects, *inter alia*, constitutional values of free speech, assembly, equal protection, and due process. See Benjamin Aaron, *The Labor-Management Reporting & Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960).

45. See GRODIN, *supra* note 33.

46. See Aaron, *supra* note 44.

### C. *The Analogy of Public Employees*

The recognition that public employees have rights against their employers under the federal Constitution is a fairly recent development.<sup>47</sup> Prior to the 1960s, the United States Supreme Court adhered to the implications of Justices Holmes' unfortunate syllogism: there is no constitutional right to be a policeman; *ergo*, government may condition being a policeman, or any other kind of public employee, upon the relinquishment of what would otherwise be the employee's constitutional rights.<sup>48</sup> In upholding New York's ban on teaching by members of subversive groups, the Court said, "[i]f they do not choose to work on such terms they are at liberty to retain their beliefs and associations and go elsewhere."<sup>49</sup> This rationale of choice echoed the contract-liberty rationale for the at-will rule in the private sector, and the result was the same: authority wore the mask of freedom and status came cloaked as contract.

In the 1960s the Court abandoned the right-privilege distinction and developed the doctrine of unconditional conditions: the government may not condition employment upon waiver of constitutional rights unless such a waiver is justified by some overriding governmental interest.<sup>50</sup> The new analysis was applied to freedom of association, freedom of expression, and the privilege against self-incrimination. The principle was later applied, with some variations, to patronage practices, the right to travel, the right to privacy, freedom from unreasonable searches, and due process.<sup>51</sup>

The Rehnquist Court has backed away from the earlier expansion of public employees' constitutional rights, moving toward a balancing test in which considerable deference is paid to the governmental entity's own estimate of what is required for efficient operations.<sup>52</sup> Meanwhile, however, state constitutional protection for individual rights has blossomed.<sup>53</sup> It is not uncommon, therefore, for public employees in a

47. See generally *Development in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1738-47 (1984).

48. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (upholding summary dismissal of a public employee for engaging in political speech).

49. *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1951).

50. The process began with *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in which the Court invalidated a New York loyalty oath statute nearly identical to the one upheld in *Adler* and repudiated *Adler's* "go-elsewhere" rationale.

51. For discussion of these developments and case citations, see *Developments in the Law*, *supra* note 47, at 1756-1800.

52. For critical analysis of this trend, see Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1986); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3 (1987); Comment, *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1811 (1984).

53. For useful analyses of state court interpretations of state constitutions generally, see Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE

particular state to enjoy greater rights under their state constitution than they have under the federal Constitution.

While there are certainly differences between public and private employees which support different legal analyses of the employment relationship,<sup>54</sup> the tension created by the distinction will inevitably be resolved in favor of convergence.<sup>55</sup> If the question is whether there is anything in the nature of public employment that makes the protection of constitutional values more important to the *employees* than in private employment, I would think the answer is no. An employee's interest in expressing his views, in protecting his privacy against intrusion, or in being treated fairly is the same whether his employer is a governmental entity or a private corporation. Such interests are at least as likely to be threatened in the private sector as in the public, and there is no reason to believe that private employees have significantly greater options in terms of alternative employment opportunities.

If the question is whether the *public* should be more concerned about what happens to public employees in their employment relationship, the answer is a qualified yes. Because such employees are employed by the public and paid with taxpayers' money, it can be said that the public has a heightened responsibility for "its own" employees.<sup>56</sup> But this distinction provides insufficient basis for public neglect of comparable private employee interests. Ours is, after all, an interdependent society, and the general public benefits from the goods and services which employees provide in the public sector no less than the private. Ours is

---

L. REV. 731 (1982); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1375 (1985).

54. With respect to collective bargaining and strikes, for example, the political dimension that pervades public employment is highly relevant to the determination of public policy. See Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974). Similarly, to the extent that protection for employee speech rests on the public significance of the speech, communications by public employees may be considered entitled to broader protection.

55. Distinguishing between public and private employees in terms of legal consequences that attach to the employment relationship has proved difficult in a variety of contexts. Those who undertook to explain why public employees should not enjoy collective bargaining, for example, put forth prodigious effort with dubious success. See, e.g., Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969) (arguing that collective bargaining cannot be fully transplanted from the private sector to the public sector); John F. Burton, Jr. & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1969) (advocating a public policy which would permit some, but not all, public employees to strike). The disparity between the rights of public and private employees to strike continues to present an awkward issue. See, e.g., *County Sanitation Dist. v. Los Angeles County Employees Ass'n*, 699 P.2d 835 (permitting sanitation district employees to strike to improve wages or conditions of employment where work stoppage does not pose an imminent threat to public health or safety), *cert. denied*, 474 U.S. 995 (1985).

56. Scott Sundby makes this argument, after conceding that the state-private distinction appears most happenstance in the employment context. Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 144 n.11 (1989).



also an economic system enhanced by laws and subsidies that tend to blur the public/private distinction in many contexts.<sup>57</sup> More fundamentally, the public benefits from the recognition and exercise of basic rights in both the public and private sectors of employment. In some cases the benefit may be direct, as where the right in question is freedom of expression and the subject is a matter of public concern. In other cases the benefit is less direct but no less important; the recognition and exercise of constitutional values throughout our society foster the development of positive basic values. Our community is a healthier, more resilient one to the extent that our citizens enjoy and exercise rights which we consider fundamental to democracy.

Employers in the private sector may have a relevant claim, partly based on competing constitutional values, that public employers do not have. This is particularly true for the small employer, whose interests in efficiency, self-fulfillment, freedom of association, and privacy may be affected by government regulation. This may provide a sound basis for taking size into account in any form of legal regulation.<sup>58</sup> It is not a compelling argument, however, for a blanket refusal to protect constitutional values in the private sector workplace.

Finally, the fact that public employees enjoy certain constitutional rights supports an argument for equal treatment that cannot easily be ignored. Whatever distinctions might be made between the relationship of citizen to government and that of employee to employer, the fact that the two relationships are considered to be sufficiently similar to warrant the application of constitutional principles to public employment provides strong support for a claim by private employees that they are entitled to equal respect.

Recognition of the similarity of the situations of private and public employees does not necessarily entail the direct application of constitutional provisions to the private employment relationship. Abandonment or dilution of the state action requirement in the employment context does, by definition, constitutionalize certain aspects of the relationship, and to that extent insulates the relationship from legislative control.<sup>59</sup>

---

57. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

58. I recognize that it is difficult for courts to take size into account, and institutionally inappropriate for them to exempt employers under a certain size from otherwise applicable common law rules. It is for this reason, among others, that I consider legislation protective of job security to be appropriate. See Grodin, *supra* note 17.

59. For a critical view of the extension of state constitutional guarantees to private actors, see Sundby, *supra* note 56. For a more general critique, see Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Private Power" Approaches*, 1979 WASH. U. L.Q. 757 (1979). In addition to the observation reflected in the text, Professor Sundby also observes that extending constitutional protection to private actions would expand the judiciary's power to find constitutional violations, but that is true whenever a constitution is amended to add a new provision. Professor Sundby acknowledges that the state-private distinction appears most arbitrary in the employment context. Sundby, *supra* note 56, at 144 n.11.

Whether that is good or bad depends upon the nature of the right being insulated and the nature of the political process that threatens it; the argument for protecting certain employee rights from transient popular moods (such as the "war on drugs") may be as forceful in the private sector as in the public.<sup>60</sup> And in some situations constitutional text and history may point strongly in that direction.<sup>61</sup> Some of the cases I will discuss do in fact accept the direct application of constitutional provisions. For the most part, however, the vehicles for importation of constitutional values have been either statutes or common law doctrines. We turn now to an examination of the doctrines and patterns of regulation that have emerged.

### III

#### DOCTRINES AND PATTERNS OF REGULATION

As happens so often in the law, the doctrinal sources of protection for constitutional values in the private sector workplace tend to overlap. Constitutional principles, in addition to whatever independent force they possess, may provide the backdrop for statutory interpretation, or they may provide the content of a common law rule. For example, a court might look to constitutional principles as a source of public policy to be applied through the rule, accepted in a number of states, that termination of even an at-will employee for reasons which offend public policy is wrongful.<sup>62</sup> Common law doctrines, particularly in the arena of privacy, may in turn inform the content of constitutional principles.<sup>63</sup> At the same time, doctrinal techniques overlap subject matter, thus threatening to make any organizational scheme complex. My solution is to discuss doctrinal alternatives under the heading of selected (but by no means exhaustive) constitutional values—privileges and immunities, freedom of expression and association, privacy, equal protection, and due process<sup>64</sup>—and let the chips fall where they may.

---

60. For such an argument see Jennifer Friesen, *Should California's Constitutional Guarantee of Individual Rights Apply Against Private Actors*, 17 HASTINGS CONST. L.Q. 111 (1989).

61. This is the situation with respect to the California Constitution's privacy provision. See *infra* notes 133-36 and accompanying text.

62. For discussion of the origins of the public policy exception see *infra* pages 19-24. A number of courts have referred to state and federal constitutional provisions as a source of public policy. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (First Amendment); *Ring v. River Walk Manor, Inc.*, 596 F. Supp. 393 (D. Md. 1984) (First and Fourteenth Amendments); *Luedtke v. Nabors Alaska Drilling Co.*, 768 P.2d 1123 (Alaska 1989) (state constitutional provision protecting privacy). But see *Barr v. Kelso-Burnett Co.*, 478 N.E. 2d 1354 (Ill. 1985) (First Amendment does not provide protection against private individuals or corporations which seek to abridge free expression).

63. See *infra* notes 116-28 and accompanying text.

64. I have omitted freedom of religion. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (First Amendment requires that employer who provides paid leave for personal reasons not exempt religious reasons). While Title VII requires accommodation to religious practices, the

*A. Privileges and Immunities of Citizens*

Whether or not the worker can meaningfully be said to have citizenship in the workplace, he is in any event a citizen within the various political communities—local, state, and federal—in which he resides. As such, he has certain rights and obligations which deserve protection against interference by his employer in the same way as his privileges and immunities as a citizen of the United States are protected by the Fourteenth Amendment against interference by the state.<sup>65</sup> It is a matter of relative sovereignty.

The early cases protecting union members against discipline for activity such as testifying or voting in a particular way<sup>66</sup> can be usefully viewed as protecting the privileges and immunities of citizenship from employer interference. The same is true of many cases that invoked the public policy exception to the at-will principle in the context of termination. Significantly, the public policy exception had its genesis in a 1959 case in which the employer was a labor union and the plaintiff both an employee and a member.<sup>67</sup>

Petermann, a member of and business agent for a Teamsters local in Southern California, complained that he had been suspended from membership and discharged from his job because he insisted upon testifying truthfully before a legislative committee in Sacramento. His complaint as a member was dismissed for failure to exhaust internal remedies,<sup>68</sup> but had it not been for that procedural defect the court would undoubtedly have invalidated his suspension as contrary to public policy under then existing precedent. No such precedent existed for the employer-employee relationship, but the court created it, declaring that it was contrary to public policy to permit the dismissal of an employee for refusal to commit perjury.<sup>69</sup>

Over time, courts generalized the *Petermann* principle to protect

---

scope of that requirement is quite narrow. Cf. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (employer not required to impose burdens on other employees to accommodate sabbatarian practices). The Supreme Court's decision in *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) threatens to curtail the scope of the First Amendment free exercise clause.

65. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) gave a narrow reading to the privileges and immunities clause, rejecting the argument that the clause was intended to protect certain fundamental rights against state interference. Instead, the clause has been considered to protect only those rights said to inhere in national citizenship. In *Twining v. New Jersey*, 211 U.S. 78, 97-98 (1908), the Supreme Court provided a list of those rights which had been judicially recognized. Those relevant here include the right to petition Congress for redress of grievances, the right to vote for national officers, and the right to inform United States authorities of violations of its laws.

66. See *supra* notes 41-43 and accompanying text.

67. *Petermann v. Teamsters Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959).

68. *Id.* at 29.

69. The court reasoned that the public welfare concerns underlying the California Penal Code and its provisions prohibiting perjury could not be served if "one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer." *Id.* at 27.

employees against termination for refusing to commit other sorts of unlawful acts,<sup>70</sup> for insisting upon the performance of some civic duty, such as jury service,<sup>71</sup> for utilizing public tribunals to vindicate a right against the employer,<sup>72</sup> and for complaining to public authorities about a violation of the law.<sup>73</sup> Indeed, many of the cases decided under the public policy exception can be viewed in terms of the courts' insistence upon the supremacy and integrity of public law. To that extent the privileges and immunities clause provides a useful analogy. Not all of the cases fall readily into that analysis, however. As will be discussed, some of the public policy exception cases are more comfortably accounted for in terms of the protection of substantive rights.

### B. Freedom of Expression and Association

There is a curious incongruity in the way protection for freedom of speech and association developed in the public and private sectors.<sup>74</sup> The First Amendment has been held to protect speech by public employees on matters of "public concern."<sup>75</sup> The concept of "public concern" has been held to include a wide range of issues, but is not broad enough, apparently, to include grievances over personnel matters<sup>76</sup> unless they

---

70. See, e.g., *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refusal to participate in illegal price fixing scheme). *Tameny* held that termination of an employee for a reason which offends public policy gives rise to an action in tort, governed by tort principles of remedy. Most courts that recognize the public policy exception agree. But see *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467 (1984) (at-will employee has no tort claim for wrongful discharge in violation of alleged public policy to promote job security); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983) (holding that discharge for refusal to perform an act that violates public policy violates an implied promise of the employment contract, and gives rise to contract remedies only).

71. *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975).

72. See, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (file worker's compensation claim).

73. See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) (reporting shipment of adulterated milk), *cert. denied*, 471 U.S. 1099 (1985).

74. My focus here is upon speech by employees. The related question of access by non-employees to an employer's property, in order to communicate with employees who are working there, also poses issues of constitutional values. See *Summers*, *supra* note 5, at 704-08.

75. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *Pickering*, a public school teacher, was discharged because he wrote and published in a newspaper a letter which criticized the local school board for its handling of a bond issue and the school superintendent for attempting to stifle opposition. As a teacher, the court observed, *Pickering* was in a position to be particularly informed as to how funds allocated to the schools should be spent; thus, the expression of his views would be particularly informative of public debate. At the same time, his speech was unlikely to have an adverse effect upon governmental efficiency. There was "no question of maintaining either discipline by immediate superiors or harmony among coworkers", and his relationships with the school board were "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. The court concluded that *Pickering's* dismissal violated his rights under the First Amendment. *Id.* at 565.

For a critical view of post-*Pickering* developments, see *Lieberwitz*, *supra* note 52.

76. *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, an Assistant District Attorney in New Orleans was fired for circulating among other Assistant District Attorneys a questionnaire

have some distinctly public dimension, such as race discrimination<sup>77</sup> or pressure to work in political campaigns.<sup>78</sup> Freedom of association for public employees has been broadly construed to include freedom from discrimination based upon political affiliation.<sup>79</sup>

Until recently, one of the only protections in the unorganized private sector has been for speech which *does* relate to personnel matters. The National Labor Relations Act protects association and expression that is directed toward improvement of wages or working conditions, including complaints by individual grievants that are related to group interests.<sup>80</sup> As noted above, this protection applies even in the unorganized setting, and is construed to embrace speech directed toward improvement of job conditions through political action.<sup>81</sup> Arbitrators deciding cases under collective bargaining agreements have been more broadly sensitive to free speech considerations.<sup>82</sup> But until recently, unorganized private employees have received almost no protection for other kinds of speech or activity that would qualify for protection under the First Amendment<sup>83</sup> or comparable state constitutional provisions.

One of the most significant developments in modern employment law has been the growth of protection for employee "whistleblowing",

---

seeking their views, among other things, on office transfer policy, office morale, the need for a grievance committee, and the level of confidence in supervisors. The questionnaire grew out of a dispute between the Assistant District Attorney and her supervisor over a proposed transfer. *Id.* at 141. In a 5-4 decision, the Court characterized this part of the questionnaire as non-public speech, or "an employee grievance concerning internal office policy," and therefore worthy of only minimal First Amendment consideration. *Id.* at 154.

77. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (complaint by teacher to principal that appointments and assignments of nonprofessional employees in the school were being made on a racially discriminatory basis).

78. The questionnaire circulated in *Connick v. Myers* also asked Ms. Myers' fellow Assistant District Attorneys whether they felt pressured to work in political campaigns. The Court conceded that this part of the questionnaire touched upon a matter of public concern, but decided on the basis of the need for a "close working relationship" within a prosecutor's office that there should be a wide degree of deference to the employer's judgment as to the potential for disruption, and on that basis concluded that Ms. Myers' termination was justified. *Connick v. Myers*, 461 U.S. at 149-50.

For a critique of *Connick* and its limitations, see Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3 (1987).

79. *Branti v. Finkel*, 445 U.S. 507 (1980) (firing of Assistant Public Defenders by newly appointed Public Defender of different party held to violate First Amendment); *Elrod v. Burns*, 427 U.S. 347 (1976) (patronage practices of newly elected county sheriff, replacing non-civil service employees with members of his own party, held to violate First Amendment).

80. The speech which the Supreme Court held unprotected in *Connick v. Myers* would probably be protected under Section 7 of the NLRA since it related to working conditions and invited group participation. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

81. *Supra* note 29 and accompanying text.

82. See Dana C. Palmer, *Free Speech and Arbitration: Implications for the Future*, 27 LABOR L.J. 287 (1976) (discussing the implications of *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1975)).

83. *Cf. Lynd*, *supra* note 24 (arguing that protection under Section 7 of the NLRA had evolved in the direction of convergence with First Amendment protection for public employees).

both through judicial decisions and (more recently) through statutes.<sup>84</sup> The paradigm case is one in which the employee reports to public authorities some violation of statute or regulation that he has observed.<sup>85</sup> At least where the wrongdoing can be expected to impact upon parties other than the employer,<sup>86</sup> the public interest in such a case is clear. The conclusion that the employee is entitled to protection in such a case is a very small step from the *Petermann* principle that an employer cannot coercively enlist an employee in the employer's wrongdoing. The conclusion is also consistent with the protection afforded public employees under the First Amendment.

When whistleblowing occurs *within* the organization, the availability of protection is less certain.<sup>87</sup> The United States Supreme Court, while recognizing that the time, place, and manner of such communications may pose problems of morale and efficiency, has held that if the subject matter of an employee's speech meets the "public concern" test

---

84. See generally Thomas R. Schultz, *State Law Protection of At-Will Employees Who "Blow the Whistle"*, 65 U. DET. L. REV. 551 (1988). A substantial number of federal statutes provide protection for those who report statutory violations to public authorities. See Eugene R. Fidell, *Federal Protection of Private Sector Health and Safety Whistleblowers*, 2 ADMIN L.J. 1, 7-8, 38 (1988). The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 102 Stat. 2845 (1978) (codified at 5 U.S.C. §§ 2301-2305 (1988)) provides protection to federal public employees against reprisal for the lawful disclosure of information which they reasonably believe evidences either a violation of law, rule or regulation, or (more broadly) mismanagement, gross waste of funds, abuse of authority, or substantial danger to public health or safety.

85. See, e.g., *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (report of criminal violations to local law enforcement agency); *Brown v. Physicians Mutual Ins. Co.*, 679 S.W.2d 836 (Ky. Ct. App. 1984) (report of regulatory violations to state insurance department).

86. In *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981), the Illinois Supreme Court held that a managerial employee stated a cause of action under the public policy exception by alleging that he was fired for supplying information to local law enforcement authorities regarding an employee's possible involvement in a violation of the state's criminal code and for agreeing to assist in the investigation and trial of the employee if requested. The complaint did not allege what crime "might" have been committed, and the defendant (supported by a dissenting Justice) argued that an employer should be entitled to reserve discretion with respect to what to do about the hypothetical theft of a "\$2 screwdriver," so as not to impair the company's internal security program or adversely affect labor relations. *Id.* at 880. The majority responded that the magnitude of the crime "is not the issue," the state legislature having decided "that the theft of a \$2 screwdriver was a problem that should be resolved by report to the criminal justice system." *Id.* at 879-80. The company (and the dissent) have a point. The Illinois Supreme Court has since characterized *Palmateer* as protecting the act of initial reporting to the police, as well as cooperation in an investigation. *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985).

87. Compare *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974) (no protection for salesman who pressed his view within management that the company's product had not been adequately tested, and posed a serious safety danger) with *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (improper to dismiss claim of quality control director who was terminated for reporting in writing to company management that some products failed to meet the specifications contained in the defendant's standards and labels) and *Zaniecki v. P.A. Bergner & Co.*, 493 N.E.2d 419 (Ill. Ct. App. 1986) (holding that *Palmateer* does not extend to wholly internal disclosure of suspected wrongdoing) with *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575 (Ill. Ct. App. 1986) (employee should be free to report accounting improprieties to superiors even if no report is made to law enforcement officials), *appeal denied*, 505 N.E.2d 353 (Ill. 1987).

he does not forfeit the First Amendment protection by expressing his views internally rather than to outside authority.<sup>88</sup> A number of state courts have applied the common law public policy exception to the at-will rule in like manner, upholding complaints by employees who allege that they were terminated for reporting internally on such matters as the failure of the company's products to meet specifications contained in the company's standards and labels<sup>89</sup> or accounting improprieties.<sup>90</sup> Several of the state whistleblower statutes expressly cover reports to superiors as well as to public authorities.<sup>91</sup> Indeed, at least one such statute conditions protection for outside whistleblowing upon the exhaustion of available internal remedies.<sup>92</sup>

Some of the state court decisions denying protection for internal whistleblowers are compatible with federal First Amendment principles, in that the communication did not touch upon a matter of public concern. For example, the California Supreme Court held in *Foley v. Interactive Data Corp.*<sup>93</sup> that the public policy exception was not available to an employee who alleged that he had been fired for reporting to management that his newly appointed supervisor was under investigation by the FBI for embezzlement on another job, even though the employee was under a duty, arguably statutory, to make the report.<sup>94</sup> Distinguishing cases in which employees were fired for reporting criminal activity to proper authorities<sup>95</sup> or for disclosing "other illegal, unethical or unsafe practices,"<sup>96</sup> the court observed that no public policy would be violated if the employer and employee *agreed* that the employee had no obligation to, and should not, inform the employer of any adverse information the

---

88. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

89. *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980).

90. *Johnson v. World Color Press, Inc.*, 505 N.E.2d 353 (Ill. 1987). *But see Zaniecki v. P.A. Bergner & Co.*, 493 N.E.2d 419, 421 (Ill. Ct. App. 1986) (holding that *Palmateer* does not extend to wholly internal disclosure of suspected wrongdoing).

91. LA. REV. STAT. ANN. § 30:2027(a) (West 1991); ME. REV. STAT. ANN. tit. 26, §§ 832(2), 833(1) (West 1991); N.J. REV. STAT. § 34:19-3 (1991); N.Y. LABOR LAW § 740(2) (Consol. 1992).

92. N.Y. LAB. LAW. § 740(3) (Consol. 1992). *See also* ME. REV. STAT. ANN. tit. 26, § 833(2) (West 1991).

93. 765 P.2d 373 (Cal. 1988).

94. Section 2854 of the California Labor Code, enacted in 1872 as part of an attempt to codify the common law of master and servant, provides that an employee shall use "ordinary care and diligence" in the performance of his duties. CAL. LAB. CODE § 2854 (1989). Plaintiff *Foley* argued that this provision embraced the common law duty of loyalty to communicate relevant information to one's employer. The court declared that "[i]t is not clear whether the duty to communicate relevant information is subsumed under the statutory duty of ordinary care, or is a separate duty not codified by the 1872 Legislature." 765 P.2d at 379.

95. The court cited *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) and *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. Sup. Ct. 1981).

96. 765 P.2d at 380. The court cited *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290 (1982), in which the plaintiff claimed that he had been fired for complaining to his employer that smoking by other employees was causing him discomfort and endangering his health.

employee might learn about a fellow employee's background.<sup>97</sup> From that premise, the court reasoned: "[I]t cannot be said that an employer, in discharging an employee on this basis, violates a fundamental duty imposed on all employers for the protection of the public interest."<sup>98</sup> "When the duty of an employee to disclose information to his employer serves only the private interest of the employer", the court concluded, "the rationale underlying the [public policy cause of action] is not implicated."<sup>99</sup>

There are occasions, however, when an employee's disclosure of information to his employer may be said to serve the public interest. That would seem to be true when the information disclosed reveals the breach of a duty owed to the consumers of the enterprise or the public at large.<sup>100</sup> The employee would be protected in reporting such information to public authorities, but the public also has an interest in maintaining a workplace atmosphere in which the employee feels free to report to his supervisors, or to management, so as to increase the likelihood that the wrongdoing will be detected and deterred.

Similarly, the public has an interest in the enforcement of duties employers owe to employees under public law—the duty not to discriminate on the basis of race or sex, for example, or the duty to provide a safe place of work. This interest is sufficiently strong to make the internal reporting of violations a matter of public concern. When the employer is arguably the only victim of criminal conduct—theft of company property by a fellow worker, for example—the issue is theoretically more debatable. If an employer wants to insulate himself from reports of such wrongdoing, perhaps he should be entitled to do so.<sup>101</sup> But such fine distinctions are likely to engender such confusion as to render protection meaningless. Public policy would be better served by extending protection to any report of violation of a public norm, subject to reasonable restrictions on time, place, and manner.

Underlying consideration of this issue is a more basic question, that of whether it is desirable to constrain protection for employee speech within the confines of some separately identifiable "public interest." Constitutional scholars raise similar questions with respect to First Amendment analysis generally—whether freedom of speech should be constitutionally valued only as a means toward effectuating democracy,

---

97. 765 P.2d at 380 n.12.

98. *Id.*

99. *Id.* at 380. The most significant part of the *Foley* opinion was its holding that breach of the covenant of good faith and fair dealing does not give rise to tort remedies, as some of the lower courts had held, but only to contract remedies. *Id.* at 389-401. Evaluation of that holding and its significance is beyond the scope of this article.

100. *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974).

101. *See supra* text accompanying note 97.



or as an end in itself.<sup>102</sup> The “public concern” test applied by the Supreme Court in the public employment cases has been criticized for being overly instrumental and thus ignoring the importance of self-realization.<sup>103</sup> But even under that test workers have been protected against dismissal for engaging in a broad range of activities, including the expression of support by an employee in a county constable’s office for assassination of the President of the United States<sup>104</sup> and a police officer’s off-work performance in blackface.<sup>105</sup> This indicates, as the First Circuit has suggested,<sup>106</sup> that “public concern” may mean anything other than a personal grievance.

The Third Circuit’s opinion in *Novosel v. Nationwide Insurance Co.*<sup>107</sup> suggests a broader focus on workers’ rights. In that case an employee complained that he had been terminated because he refused to engage in certain political activity—lobbying for a no-fault law—which his employer, an insurance company, favored. The court, applying Pennsylvania law, found public policy supporting the employee’s claim in federal and state constitutional protection. The principles underlying the decisions which protect the free speech rights of public employees, the court said, “do not confine themselves to the narrow confines of state action . . . an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities.”<sup>108</sup> Protection of such interests therefore involved “no less compelling a societal interest than the fulfillment of jury service or the filing of a workers’ compensation claim.”<sup>109</sup> The *Novosel* approach, if adopted as part of the public policy exception analysis, would provide a more direct nexus between common law principles and constitutional values while avoiding direct constitutional application.<sup>110</sup>

State constitutions and the public policies that they embody are of course not limited by the construction given to the First Amendment. Most state constitutions contain affirmative statements of protection for

102. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-89 (2d ed. 1988).

103. See, e.g., Cynthia K. Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109 (1988) (advocating replacement of that test by an inquiry into whether the speech impaired the governmental institution’s ability to function).

104. *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that the First Amendment protected a clerical employee in a county Constable’s office who, upon hearing of an attempt on the life of President Reagan, said to fellow workers: “If they go for him again, I hope they get him”).

105. *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

106. *Berger v. Battaglia*, 779 F.2d at 998.

107. 721 F.2d 894 (3d Cir. 1983).

108. *Id.* at 899-900.

109. *Id.* at 900. Pennsylvania courts appear unimpressed by the *Novosel* analysis. See, e.g., *Burkholder v. Hutchinson*, 589 A.2d 721 (Pa. Super. Ct. 1991).

110. There must be situations in which an employer *could* limit an employee’s outside political activity—as where, for example, the employee is hired as a lobbyist. The court in *Novosel* impliedly recognized such a limitation by incorporating the balancing test enunciated by the United States Supreme Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). 721 F.2d at 901.

freedom of speech;<sup>111</sup> courts in some states have interpreted these provisions to apply in circumstances in which federal constitutional requirements for state action would not be met.<sup>112</sup> While no court has held that a state constitutional provision protecting freedom of expression applies directly to a private employer, the potential for such a holding exists.<sup>113</sup>

The Connecticut legislature bypassed the need for such a holding by enacting a statute that makes constitutional free speech principles applicable to the workplace through a private cause of action. The statute applies to any employer, public or private, who subjects any employee to discipline or discharge because of the employee's exercise of rights guaranteed by the First Amendment or comparable provisions of the state Constitution.<sup>114</sup> The employer may defend on the ground that the employee's activity "substantially or materially interfere[s] with the employee's bona fide job performance or the working relationship between the employee and the employer", but absent a successful defense it will be liable for damages (including punitive damages) and reasonable attorney's fees.<sup>115</sup> The Connecticut statute represents the most sweeping recognition to date of "First Amendment" values in the private sector workplace.

---

111. New York's constitution provides the model for the majority of state constitutions. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." N.Y. CONST. art. I, § 8. Apparently 43 state constitutions contain such affirmative statements. See Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 61 n.39 (1987); Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 n.79 (1980).

112. See Note, *supra* note 111.

113. For a view in support of that approach, see Note, *Free Speech, The Private Employee, and State Constitutions*, 91 YALE L.J. 522 (1982). There is one situation in which the First Amendment may have direct application, and that is where a law requires an employer to deter or punish employee expression in order to protect other employees against racial or sexual harassment. See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1542 (M.D. Fla. 1991) (holding First Amendment no bar to order requiring employer to adopt policy prohibiting, *inter alia*, the display of pictures, posters, or other materials that are "sexually suggestive, sexually demeaning, or pornographic," including the depiction of a person of either sex who is not fully clothed).

114. CONN. GEN. STAT. ANN. § 31-51q (West 1987) provides:

Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

The three provisions of the first article of the Connecticut constitution referenced by the statute protect freedom of religion (section 3), freedom of speech (section 4) and freedom of association (section 14).

115. CONN. GEN. STAT. ANN. § 31-51q (West 1987). The statute also provides that the court may award costs and reasonable attorney's fees to the employer if it determines that the plaintiff's action was brought without substantial justification.

### C. Privacy

Claims of protection for privacy interests—be they interests in the integrity of one's person or possessions, the confidentiality of information about one's self, or in one's autonomy as a human being—provide the subject matter for the most recent growth in employment-related litigation. While drug testing occupies center stage, other privacy issues are clearly visible. Others undoubtedly wait in the wings.

In the privacy arena, more than in any other, common law doctrines are historically and analytically intertwined with federal and state constitutional provisions.<sup>116</sup> This is particularly true of the search and seizure provisions of the Fourth Amendment, the self incrimination provisions of the Fifth Amendment and their state constitutional counterparts. The interests protected by these provisions overlap considerably with the interests protected by common law privacy doctrine, such as interests in seclusion and in the protection of information about one's self.<sup>117</sup> For example, the Supreme Court's holding in *O'Connor v. Ortega*<sup>118</sup> that a public employee may have a reasonable expectation of privacy in his office, including his desk and file cabinets,<sup>119</sup> finds an echo in a Texas appellate court's decision in *K-Mart Co. v. Trotti*,<sup>120</sup> which held that an employer's search of an employee's locker and purse constituted a tortious invasion of the employee's privacy at common law: "[A]n unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged."<sup>121</sup> In both *Ortega* and *Trotti*, the holdings turned upon the

116. For discussion of the historical relationship see R.H. Clark, *Historical Antecedents of the Constitutional Right to Privacy*, 2 U. DAYTON L. REV. 157 (1977). For examination of the doctrinal relationship in the employment context see Edward M. Chen, Pauline T. Kim & John M. True, *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON U.L. REV. 651 (1990).

117. Inspired by the now century-old article by Samuel Warren and Louis Brandeis, common law privacy doctrine has developed to include unreasonable intrusion upon the seclusion of another, appropriation of another's name or likeness, unreasonable publicity given to the private life of another, and publicity that unreasonably places another in a false light. RESTATEMENT (SECOND) OF TORTS § 652A (1977). Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

118. 480 U.S. 709 (1987).

119. The Court refused to require either a warrant or probable cause for such a search, but held that the search must be judged by the "standard of reasonableness under all the circumstances," and that "[u]nder this standard, both the inception and the scope of the intrusion must be reasonable." *Id.* at 725-26. The plurality opinion by Justice O'Connor indicated that a search by a supervisor will "[o]rdinarily . . . be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *Id.* at 726 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)). The opinion leaves open the question whether individualized suspicion is required for such an investigatory search. *Id.*

120. 677 S.W.2d 632 (Tex. Civ. App. 1984).

121. *Id.* at 636 (citing *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1986) and *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973)).

existence of a "legitimate expectation of privacy" on the part of the employee.<sup>122</sup> In *Texas Department of Mental Health & Mental Retardation v. Texas State Employees Union*,<sup>123</sup> a state court relied upon common law privacy doctrine, as well as the Fourth Amendment, to invalidate a state agency's regulations requiring employees to submit to polygraph examinations during investigation of alleged misconduct. The court stated:

The scope of protection given by the fourth amendment to the privacy interest is measured by the 'reasonableness' standard . . . . This is the identical standard established by the common law of Texas for determining the scope of protection given the same interest by that portion of its common law doctrine dealing with tortious invasions of the interest or the imposition of unreasonable conditions of employment."<sup>124</sup>

State courts have also relied upon common law privacy doctrine to provide an employee with relief where an employer barged into the employee's home when the employee did not appear at work one morning,<sup>125</sup> forced an employee suspected of using drugs to take a polygraph examination,<sup>126</sup> or questioned an employee about her sex life.<sup>127</sup> The Massachusetts Supreme Court, without deciding the issue, acknowledged that "in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests."<sup>128</sup>

Drug testing of employees through urinalysis, which implicates bodily integrity and informational privacy strongly enough to constitute a "search" within the meaning of the Fourth Amendment,<sup>129</sup> is also susceptible to analysis and restriction under common law privacy doctrines.<sup>130</sup> To date, however, courts have generally not relied upon those doctrines in the cases that have challenged drug testing in the private

---

122. *Ortega*, 480 U.S. at 716 ("As with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the [Fourth] Amendment'.") (citation omitted); *Trotti*, 677 S.W.2d at 638 (fact that employee supplied lock for locker with the employer's knowledge created an expectation of privacy). In *Trotti*, the court held that the employer's search of the employee's locker was not justified by the employer's generalized suspicion that employees were stealing store property and merchandise. 677 S.W.2d at 640.

123. 708 S.W.2d 498 (Tex. Ct. App. 1986), *aff'd in part and rev'd in part*, 746 S.W.2d 203 (Tex. 1987).

124. *Id.* at 506 n.5. See also *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660 (Cal. 1986) (polygraph testing of some groups of public employees held to violate state constitutional equal protection guarantee in light of (1) state constitutional right of privacy implicated by such testing, and (2) statutory exemption of private employees and police personnel).

125. *Love v. Southern Bell Tel. & Tel. Co.*, 263 So. 2d 460 (La. Ct. App. 1972).

126. *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067 (1st Cir. 1986).

127. *Phillips v. Smalley Maint. Servs.*, 435 So. 2d 705 (Ala. 1983).

128. *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 912 n.9 (Mass. 1982).

129. *Skinner v. Railway Executives Ass'n*, 489 U.S. 602 (1989).

130. See *Chen, Kim & True*, *supra* note 113, at 669.

sector.<sup>131</sup> Rather, courts have approached such cases in terms of wrongful termination principles, inquiring whether the dismissal was contrary to a contractual requirement of good cause or contrary to public policy.<sup>132</sup>

California is so far the only state whose constitutional privacy provision has been applied to a private employer's conduct. The provision was added to article I, Section 1 of the California Constitution by initiative amendment in 1972.<sup>133</sup> The holdings, all by various divisions of the Court of Appeal and all in the context of drug testing,<sup>134</sup> rely upon the fact that the provision does not refer to governmental action and upon the language of the election brochure that accompanied the initiative measure. This brochure characterized the amendment as providing "effective restraints on the information activities of government and business."<sup>135</sup> The divisions of the California Court of Appeals are in agreement that the constitutional provision is implicated by random drug testing, but disagree as to the standard to be applied in determining whether random drug testing constitutes an invasion of the privacy right.<sup>136</sup> Disagreement also exists over the legal consequences of a determination that the constitutional right has been infringed.

An example of this latter disagreement concerns whether an employee who is dismissed for refusing to submit to a drug test may sue his employer for wrongful termination under the public policy exception to the at-will rule. That the violation of a constitutional right is contrary to public policy seems intuitively obvious, but in *Luck v. Southern Pacific Transportation Co.*, the court, relying upon language in *Foley v. Interac-*

---

131. An exception is *Nabors Alaska Drilling Co. v. Luedtke*, 768 P.2d 1123 (Alaska 1989) in which the Alaska Supreme Court relied upon both common law privacy doctrine and a state constitutional provision as a basis for employee privacy.

132. See, e.g., *Luedtke v. Nabors Alaska Drilling Co.*, 768 P.2d 1123 (Alaska 1989).

133. As amended, the provision reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy". CAL. CONST. art. I, § 1.

134. The case which held that the right to privacy limits private institutions was *Porten v. University of S.F.*, 134 Cal. Rptr. 839 (Ct. App. 1976). In *Porten* a student complaint that a private university was revealing confidential information to state agencies.

The drug testing cases are *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App.), cert. denied, 111 S. Ct. 344 (1990); *Semore v. Pool*, 266 Cal. Rptr. 280 (Ct. App. 1990); *Wilkinson v. Times-Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989).

135. Cal. Ballot Argument 26 (1972).

136. In *Luck v. Southern Pacific Transp. Co.*, the court held that a "compelling interest" standard applied, and that random drug testing of railroad employees with no safety responsibilities could not be justified under that standard. 267 Cal. Rptr. at 629-31. In *Wilkinson v. Times-Mirror Corp.*, the court upheld drug testing of applicants for employment as law book editors on the basis of a more deferential balancing test. 264 Cal. Rptr. at 202. The California Supreme Court now has before it a case involving drug testing of athletes in which the issue of the proper standard of justification is posed. *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, cert. granted, 801 P.2d 1070 (Cal. 1990).

*tive Data Corp.*,<sup>137</sup> characterized the privacy provision as giving rise to a duty which inures only to the benefit of a particular individual, rather than to the public at large. "The right to privacy is, by its very name, a private right, not a public one," the court reasoned, and the parties "could have lawfully agreed that Ms. Luck would submit to urinalysis without violating any public interest."<sup>138</sup> Therefore, under *Foley*, there was no violation of *public* policy.<sup>139</sup>

The court's analysis seems flawed. Surely the fact that the interests protected by a constitutional provision are deemed "privacy" interests does not mean that the public has no interest in protecting them. Indeed, it is difficult to imagine any greater indicia that a legal principle carries overriding public interest (and is non-waivable) than its inclusion in a constitutional listing of "inalienable" rights.<sup>140</sup>

The court's dicta that the parties could validly have agreed to urinalysis testing<sup>141</sup> is almost certainly wrong if the court meant to say that an employer may extract such an agreement from an employee as a condition of employment. In California, government may not exact a waiver of constitutional rights as a condition of publicly granted benefits or privilege except on the basis of compelling justification.<sup>142</sup> Given that the privacy provision of the California constitution is held to apply to private employers, there is no reason to believe that the doctrine of unconstitutional conditions, adapted to the employment context, would not apply as well. If, as the court held, there was no compelling justification for the testing of the plaintiff, there could hardly be compelling justification for the coercion of her consent.

The premise that the violation of a principle which benefits employees generally is not enough to trigger the public policy exception and that it is therefore necessary to identify some "public benefit" that derives from the principle's enforcement, is itself questionable. But accepting the premise, there is surely a public benefit in the enforcement of principles—such as privacy protection—that are not limited in their applica-

---

137. 765 P.2d 373 (Cal. 1988).

138. 267 Cal. Rptr. at 635.

139. It is not entirely clear why the *Luck* court found it necessary to decide that the constitutional right of privacy had been infringed. Apparently the court relied upon that infringement as a basis for upholding the jury's verdict on grounds that Ms. Luck had a contract right to be dismissed only for cause, and that refusal to accede to urinalysis testing did not constitute cause.

140. As Justice Poche, dissenting on this point, put it: "It hardly can be said with a straight face that the declaration of rights contained in Article I, section 1 of the Constitution imposes requirements whose fulfillment does not implicate fundamental policy concerns". 267 Cal. Rptr. at 639.

141. Justice Poche, in his dissenting opinion, argued persuasively that the "void-if-they-had-contracted-for-it" test enunciated in *Foley* was not intended to apply to constitutional rights. 267 Cal. Rptr. at 638.

142. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 668-69 (Cal. 1986) (city cannot condition employment upon waiver of constitutional right to privacy).

tion to the employment context, but have general application as well.<sup>143</sup> A different division of the California Court of Appeal, reaching a conclusion opposite that of the *Luck* court, put the matter eloquently:

Plaintiff's right not to participate in the drug test is a right he shares with all other employees. In asserting the right, he gives it life. While rights are won and lost by the individual actions of people, the assertion of the right establishes it and benefits all Californians in the same way that an assertion of a free speech right benefits all of us.<sup>144</sup>

Indeed, the entire argument may well be moot. The California Supreme Court has held the privacy provision to be self-executing, or capable of sustaining a cause of action without legislative action.<sup>145</sup> Presumably a plaintiff injured by an employer's infringement of rights protected under that provision could sue for damages without invoking the "public policy" theory at all.<sup>146</sup> That theory was apparently not advanced by the plaintiff in any of the cases discussed.

In Alaska, the legal situation is the reverse of *Luck*. The Alaska Constitution contains a privacy provision similar to California's,<sup>147</sup> but the provision's history lacks express support for its application to private institutions. The Alaska Supreme Court has held that state action is required for a claim to be founded directly on the privacy provision.<sup>148</sup> At the same time, the Alaska court relied upon the constitutional privacy provision, as well as upon statutory and common law protection for privacy interests, to conclude (with reliance on *Novose*) that termination of an employee for refusal to submit to urinalysis drug testing unsupported by individualized suspicion of drug use violates the state's public policy, and is therefore wrongful under the public policy exception to the at-will principle.<sup>149</sup> While the Alaska court might be faulted for deciding the constitutional issue unnecessarily, its conclusion that the public policy exception applied seems correct.

Constitutional privacy values, in addition to protecting the integrity of person and property and the confidentiality of information, have also come to encompass certain interests in autonomy—the right of the individual to engage in certain activities without official constraint. With respect to the federal Constitution, the scope of protected activities now

---

143. See WEILER, *supra* note 4, at 100 (suggesting that the test of public policy should be "whether the policy in question is implemented through a regime that operates outside of the dismissal context").

144. *Semore v. Poole*, 266 Cal. Rptr. 280, 285 (Ct. App. 1989).

145. *White v. Davis*, 533 P.2d 222 (Cal. 1975).

146. See Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1276-77 (1985).

147. Article I section 22 of the Alaska Constitution provides:

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

148. *Luedtke v. Nabors Alaska Drilling Co.*, 768 P.2d 1123 (Alaska 1989).

149. *Id.* at 1130.

seems to be limited to matters involving family and procreation,<sup>150</sup> except where the conduct implicates other constitutional rights, such as freedom of expression or association,<sup>151</sup> or where the regulation offends equal protection principles.<sup>152</sup> Under state constitutions, particularly those with explicit privacy provisions, the scope of protection for autonomy may be broader.<sup>153</sup> Additionally, statutes governing public employment have been construed in various contexts to protect employees against discipline for conduct unrelated to the job.<sup>154</sup>

In principle the worker, in relation to his employer, deserves broader protection for privacy-autonomy interests than does the citizen in relation to government. This is so because the private sector employment relationship is incident to an enterprise that has a relatively narrow and well defined goal: the making of profit. That goal provides more of a limiting principle on the legitimate extent of employer control over the activities of employees than do the broader aims of government. Public policy may well dictate that employers have considerable discretion in deciding what sorts of employee conduct require regulation, and there are circumstances in which even off-the-job conduct may be of legitimate employer interest. When the conduct in question is important to the employee's personhood or well being, however, it would seem that an employer should bear some burden of justifying interference in terms of efficiency and productivity. The burden should increase with the remoteness of the conduct from the job and its importance in the life of the worker.

Labor arbitrators, in cases involving dress and grooming codes and regulation of off-the-job conduct, have generally insisted that the codes

---

150. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (no constitutional privacy protection for homosexual sodomy).

151. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958) (inquiry into beliefs or associations); *Briggs v. North Muskegon Police Dept.*, 563 F. Supp. 585 (W.D. Mich. 1983) (cohabitation of police officer with married woman), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985). See also Michael A. Woronoff, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REF. 195 (1984); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

152. Cf. *Watkins v. United States Army*, 837 F.2d 1428 (discharge from Army on grounds of homosexuality), *vacated en banc*, 875 F.2d 699 (1989), *cert. denied*, 111 S. Ct. 384 (1990). The panel originally held that discrimination by the Army violated the Equal Protection principle of the Fifth Amendment; the court *en banc* placed its decision on estoppel grounds.

153. See *supra* notes 133-36 and accompanying text.

154. See, e.g., *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969) (court finds that statute which permits revocation of teaching credential for acts of "moral turpitude" does not permit revocation based on mere homosexual conduct); *McLeod v. Department of the Army*, 714 F.2d 918 (9th Cir. 1983) (Army warehouse worker could not be discharged for marijuana possession); *Golden v. Board of Educ.*, 285 S.E.2d 665 (W. Va. 1982) (high school guidance counselor could not be fired for allegedly immoral conduct off the job).



bear some demonstrable connection to work.<sup>155</sup> A variety of doctrines provide grounds for imposing a similar requirement in at least some non-union employment relationships in the private sector. *Rulon-Miller v. IBM*<sup>156</sup> illustrates the potential. Ms. Rulon-Miller was fired when she refused to stop dating a former IBM employee who had joined a competitor. She sued and won \$300,000 in damages; the California Court of Appeal affirmed the award. The court came close to saying that IBM's conduct violated the plaintiff's state constitutional right of privacy, but ultimately chose not to decide the case on that ground. Instead, the court focused upon the company's stated policy of not interfering with an employee's private life unless it "reduced his ability to perform regular job assignments, interfered with the job performance of other employees . . . or affected the reputation of the company in a major way."<sup>157</sup> Finding no evidence that the plaintiff's behavior violated any of these conditions, the court upheld the verdict on a combination of contract theory, the covenant of good faith and fair dealing, and the tort of intentional infliction of emotional distress.

Notwithstanding the existence of and potential for common law and constitutional protection of privacy interests, statutory protection is already dominating the field.<sup>158</sup> The most significant development to date is the Employee Polygraph Protection Act of 1988,<sup>159</sup> which prohibits the use of lie detectors except under limited circumstances.<sup>160</sup> Other federal statutes limit the types of information which may be maintained about employees,<sup>161</sup> require disclosure of the source of adverse credit in-

---

155. ELKOURI & ELKOURI, *supra* note 25, at 761-71; Hugo L. Black, Jr., *Surveillance and the Labor Arbitration Process*, 23 PROC. NAT'L ACAD. ARB. 1 (G. Somers & B. Dennis eds. 1970); John W. Leonard, *Discipline for Off-the-Job Conduct*, MONTHLY LAB. REV., Oct. 1968, at 5.

156. 208 Cal. Rptr. 524 (Ct. App. 1984).

157. *Id.* at 530.

158. For discussion of some of the earlier statutory provisions see Comment, *Employee Privacy Rights*, 47 FORDHAM L. REV. 155 (1978).

159. Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified at 29 U.S.C. §§ 2001-2009 (1988)).

160. The statute defines "lie detector" to include "a polygraph, deception graph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used . . . for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual." 29 U.S.C. § 2001(3) (1988). The statute permits testing of employees in connection with an ongoing investigation of loss or injury to employer property, but only when the employer has reasonable suspicion that a particular employee, with access to the property, was involved, and the employee is provided a statement of the basis for the suspicion in advance of the testing. 29 U.S.C. § 2006(d) (1988). Even then, the employee may not be disciplined on the basis of the test without additional supporting evidence. 29 U.S.C. § 2007(a)(1) (1988). Testing is also permitted of certain government employees (29 U.S.C. § 2006(b), (c) (1988)), of applicants for guard or security services (29 U.S.C. § 2006(e) (1988)), and of certain employees engaged in the manufacture, distribution, or dispensation of controlled substances (29 U.S.C. § 2006(f) (1988)). The statute also prescribes procedures for the conduct of tests when permitted. 29 U.S.C. § 2007(b) (1988).

161. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552(a) (1988)).

formation used to reject job applicants,<sup>162</sup> and limit the use of wiretapping in the workplace.<sup>163</sup> A variety of state statutes limit the kinds of information an employer can require of an employee,<sup>164</sup> limit the use of drug testing,<sup>165</sup> and ban the use of fingerprinting.<sup>166</sup> Legislative protection for employee autonomy can also be found in statutes which prohibit discrimination for sexual orientation or for particular relationships.<sup>167</sup>

Ultimately, protection for privacy interests in the employment relationship reflects a general principle that the power which employers derive from investment and ownership has no legitimate claim to be totalitarian power. When important employee interests are at stake, a strong justification, in terms of business necessity, may be required. A French statute states the principle broadly; in part, and loosely translated, it provides that no employer rule may intrude upon the rights of persons unless justified by the nature of the task to be accomplished and proportional to that end.<sup>168</sup> American law, through quite different means, appears to be approaching that standard.

#### D. Equal Treatment

The equal protection clause of the Fourteenth Amendment provided a constitutional backdrop to the Supreme Court's holding in *Steele v. Louisville & Nashville Railway*.<sup>169</sup> In *Steele* the Court held that the Railway Labor Act imposes upon a union acting as the statutory representative of a craft "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legis-

162. Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. §§ 1681(l)-1681(i) (1988)).

163. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-618, 82 Stat. 1236 (1968) as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-20 (1988)). See, e.g., *Watkins v. L.M. Berry*, 704 F.2d 577 (11th Cir. 1983).

164. See, e.g., MD. LAB. & EMPL. CODE ANN. § 3-701(b) (1991) (employer may not require job applicants to answer questions about physical, psychological, or psychiatric conditions unless they bear a "direct, material, and timely relationship" to job capacity).

165. See, e.g., CONN. GEN. STAT. ANN. §§ 31-51t to 31-51aa (West Supp. 1991) (requiring reasonable suspicion except where authorized by federal law or where employees serves in "high-risk" or "safety-sensitive" occupation. Similar restrictions are imposed in Minnesota (MINN. STAT. ANN. § 181.951 (West Supp. 1991) and Vermont (VT. STAT. ANN. tit. 21 §§ 511-20 (1988))).

166. N.Y. LAB. LAW § 201-a (Consol. 1991).

167. See, e.g., CAL. GOV'T CODE § 12940(a) (Deering 1991) (marital status); WIS. STAT. ANN. § 111.36(1)(d) (West 1986) (sexual orientation).

168. C. TRAV. Art. L. 122-35 (Dalloz 1988):

Le règlement intérieur ne peut contenir de clause contraire aux lois et règlements, ainsi qu'aux dispositions des conventions et accords collectifs de travail applicables dans l'entreprise ou l'établissement. Il ne peut apporter aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.

169. 323 U.S. 192, 204 (1944).

lates.”<sup>170</sup> While the Act did not contain express language to that effect, the implication of such a duty was necessary to avoid the constitutional questions which would arise if Congress had clothed the bargaining representative with power “not unlike that of a legislature” and failed to impose any corresponding obligation.<sup>171</sup> The duty of fair representation was subsequently held to exist under the National Labor Relations Act as well.<sup>172</sup>

The labor relations acts, however, provide no comparable basis for imposing an equal protection obligation upon employers, however, beyond the duty to refrain from discrimination on the basis of union membership or activity.<sup>173</sup> While the equal protection clause of the federal Constitution protects public employees against intentional discrimination,<sup>174</sup> the state action requirement bars applying federal constitutional standards directly to employers in the private sector.

State constitutions may provide broader protection. The California Supreme Court, noting that the state constitutional equal protection clause is phrased in passive language and contains no state action limitation, has held that the clause prohibits a state-protected public utility from arbitrarily discriminating against homosexuals.<sup>175</sup> California courts have not yet had occasion to consider the broader implications of that reasoning, and courts in other states with similarly phrased constitutional provisions have yet to confront the issue.

Constitutional provisions which incorporate the equal treatment principle, whether or not they apply directly to the private sector, may provide content for common law doctrines which do apply. Article I, section 8 of the California Constitution, for example, provides: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or

170. *Id.* at 202.

171. *Id.* at 198.

172. *Syres v. Oil Workers Int'l Union Local No. 23*, 223 F.2d 739 (5th Cir. 1955), *rev'd and remanded per curiam*, 350 U.S. 892 (1956); *cf. Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944) (unfair labor practice for employer to execute closed shop agreement with one union knowing that the union planned to deny membership to employees who had belonged to another union due to their affiliation with that union).

173. Judge Skelly Wright at one time articulated a theory for finding invidious discrimination by an employer on account of race or national origin to be an unfair labor practice in that it creates an unjustified clash of interests between groups of workers, reducing the likelihood of effective concerted action, and creates apathy in its victims, inhibiting them from asserting their rights against the employer. *United Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1135 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). The NLRB, however, declined to adopt that theory. *Jubilee Mfg. Co.*, 202 N.L.R.B. 272, *aff'd mem. sub nom. United Steelworkers v. NLRB*, 504 F.2d 271 (D.C. Cir. 1974).

174. *Washington v. Davis*, 426 U.S. 229 (1976).

175. *Gay Law Students Ass'n v. Pacific Tel. and Tel. Co.*, 595 P.2d 592, 602 (1979). The clause provides: “A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.” CAL. CONST. art. I, § 7(a).

national origin." In *Rojo v. Kliger*,<sup>176</sup> the California Supreme Court had occasion to consider the application of this provision to a complaint in which the plaintiffs, two female employees in a physician's office, alleged that their employer subjected them to sexual harassment and demands for sexual favors. They further claimed that their refusal to tolerate that behavior or acquiesce in the demands led to the dismissal of one and the constructive dismissal of the other. The court, while acknowledging that its previous decisions had assumed the applicability of article I, Section 8 to private as well as state action,<sup>177</sup> found it unnecessary to decide that issue. "For our purposes here," the court declared, "whether Article I, Section 8 applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental *public policy* against discrimination in employment—public or private—on account of sex."<sup>178</sup>

The court in *Rojo* found that the public policy against sex discrimination in employment was one which, in the language of *Foley*, "inures to the benefit of the public at large rather than to a particular employer or employee." The court observed that "[n]o extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists we are *all* demeaned."<sup>179</sup> Therefore, the court concluded, plaintiffs' complaint stated a cause of action for wrongful dismissal in violation of public policy.<sup>180</sup>

Statutes, rather than either constitutional or common law doctrines, have been the principal means of bringing equal protection values to the workplace. Beginning with Title 7 of the Civil Rights Act of 1964<sup>181</sup> and continuing through the Age Discrimination in Employment Act<sup>182</sup> and the Americans with Disabilities Act,<sup>183</sup> federal law has expanded the categories of status protected against employment discrimination to include race, national ancestry, religion, sex, age, and handicap. State and local

---

176. 801 P.2d 373 (Cal. 1990).

177. *Id.* at 388. The court cited its own prior dictum in *Commodore Home Sys., Inc. v. Superior Court*, 649 P.2d 912, 917 (Cal. 1982), and referenced with "cf." two Court of Appeal opinions holding the constitutional right of privacy applicable to private employers: *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App.), *cert. denied* 111 S. Ct. 344 (1990) and *Wilkinson v. Times Mirror Co.*, 264 Cal. Rptr. 194 (Ct. App. 1989).

178. 801 P.2d at 389.

179. *Id.* (emphasis in original).

180. The court referred also to legislative findings underlying the state statute prohibiting discrimination in employment. Discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." *Id.* (citing CAL. GOV'T CODE § 12920 (Deering 1982)). In an earlier part of the opinion, the court held that the statute did not preempt a common law cause of action, and that an employee bringing such a cause of action was not required to exhaust administrative remedies. *Id.* at 376-83.

181. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

182. 29 U.S.C. §§ 621-634 (1988).

183. 42 U.S.C.A. §§ 12101-12213 (West 1991).

legislation has in some instances added such additional categories as sexual orientation and marital status. Indeed, insofar as they prohibit conduct that is not intended to discriminate (such as Title VII's prohibition of certain employer practices with disparate impact) or require an employer to accommodate to the employee's status (as in the case of the Americans With Disabilities Act), such statutes go beyond the requirements of the federal equal protection clause.

It is predictable that the equal protection principle will expand beyond prohibition of status discrimination. Labor arbitrators, for instance, in their application of collective bargaining agreements, have typically insisted that the concept of "just cause" precludes disparate treatment of employees similarly situated so as to prohibit discipline of one employee for conduct that has been tolerated on the part of others or the imposition of unequal disciplinary sanctions.<sup>184</sup> It might reasonably be argued that even an at-will employee is entitled to complain of such conduct, on a theory of implied promise or breach of the covenant of good faith and fair dealing. Certainly, insofar as the just cause principle may apply to a particular relationship, the principles developed by labor arbitrators deserve to be recognized.

#### *E. Due Process*

Under collective bargaining agreements, the "just cause" concept is deemed to include a procedural component.<sup>185</sup> There can be no just cause for discipline, most labor arbitrators will say, unless the employee has had reasonable warning or foreknowledge of the possible disciplinary consequences of particular conduct and the company has conducted a fair and objective investigation before imposing discipline. Depending upon the nature of the charges, this usually means an opportunity for the employee to respond, and under some agreements it may mean a pre-termination hearing of some sort.<sup>186</sup> In any event, grievance and arbitration procedures are generally available once the discipline has been imposed.

Public employees who can demonstrate a "property" interest in continued employment also have a right to procedural safeguards through the due process clause of the Fourteenth Amendment and analogous state constitutional provisions;<sup>187</sup> those safeguards include a pre-termination hearing at which the employee is confronted with the evidence against him and provided opportunity to respond.<sup>188</sup>

---

184. ELKOURI & ELKOURI, *supra* note 25, at 684-87.

185. See sources cited *supra* note 25.

186. ELKOURI & ELKOURI, *supra* note 25, at 673-75.

187. *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

188. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

When an employee in the non-union private sector is protected against dismissal without cause by statute or contract, the incorporation of procedural safeguards into the "just cause" concept would seem to follow. The recently promulgated Model Employment Termination Act makes that linkage explicit<sup>189</sup> and the common law contains principles which point in that direction as well. Both the "fair dealing"<sup>190</sup> and judicially created principles of common law due process<sup>191</sup> support the implication of procedural terms to complement promises for substantive job protection.

Even when an employee serves at will, there is precedent and doctrine which suggest procedural protection in certain circumstances. Under the due process clause of the federal Constitution, an employee who is dismissed for reasons which become known and affect her ability to find other employment has a "liberty" interest entitling her to a hearing to clear her name.<sup>192</sup> Indeed, under some state constitutions a person's right to be free from arbitrary treatment may itself constitute a liberty interest giving rise to due process requirements.<sup>193</sup> The federal Employee Polygraph Protection Act's insistence that an employee may not be disciplined on the basis of a polygraph test without additional supporting evidence<sup>194</sup> implies the existence of some right to due process even in an at-will context. When an employer has represented to employees, through employee handbooks or through custom and practice, that particular procedures will be followed in imposing discipline, ordinary contract principles suggest that the expectations generated by such representations deserve protection. Alternatively, when an employer has led employees to believe that certain conduct is acceptable or even encouraged, common law estoppel principles may bar dismissal for engaging in that conduct without prior notification.<sup>195</sup> In addition, both the

---

189. See *supra* note 31.

190. According to the Restatement of Contracts, the covenant of good faith and fair dealing inheres in every contract. 2 RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). Some courts have denied the covenant's existence in the employment contract on the ground that it is inconsistent with the at-will premise. See, e.g., *Hunt v. IBM MidAmerica Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986); *Sabetay v. Sterling Drugs, Inc.*, 506 N.E.2d 919, 920 (N.Y. 1987). Where the relationship is other than at-will, however, no such problem arises.

191. See F. Eric Fryar, *Common Law Due Process Rights in the Law of Contracts*, 66 TEX. L. REV. 1021 (1988).

192. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

193. See, e.g., *People v. Ramirez*, 599 P.2d 622 (Cal. 1979); Robert L. Rabin, *Job Security and Due Process*, 44 U. CHI. L. REV. 60 (1976) (advocating a minimal due process requirement of a statement of reasons before dismissal).

194. See *supra* note 160.

195. Cf. *Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979) (dismissal of clerk for off-the-premises homosexual activity without prior warning violated due process in light of employee handbook and policy statements which created reasonable expectation that employees would not be dismissed for reasons unrelated to job performance).

covenant of good faith and fair dealing<sup>196</sup> and common law due process principles may provide doctrinal support for the proposition that even an at-will employee is entitled to non-arbitrary treatment. These various propositions, each with underpinnings in existing doctrine, await the effective advocate.

### CONCLUSION

Some scholars have been critical of the extent to which the collective bargaining system in the United States has become rule-bound and adversary, obsessed (in their view) with narrow concepts of individual rights to the exclusion of more meaningful participation by workers in workplace governance. To the extent that they advocate a broader vision for collective bargaining, and procedures by which workers may participate, individually and through chosen representatives, in the decisions vital to their welfare, I agree. Indeed, if I had to choose between legal protection of substantive rights and legal assurance of democratic procedures for workplace governance, I would unhesitatingly opt for the latter.

There is, however, no need for such a choice. The protection of individual rights and the promotion of democratic procedures are not inconsistent; indeed, they are complementary and supportive of one another. Nor is a system of protecting individual rights through law incompatible with a system of collective bargaining or the growth of unionism. On the contrary, legal protection is bound to be inadequate, absent the support that organization can provide, and healthy unions will be able to build upon that relationship.

My focus here has been the development of a new paradigm, a new way of looking at the employer-employee relationship, that is gradually taking the place of the older, authoritarian model. Herman Melville seemed to have that in mind, as well, though his chronology was inverted: the ship on which Billy Budd served before he was conscripted to the service of Captain Vere was called *The Rights of Man*.

---

196. There is no reason that the covenant should not be found to exist even in an at-will context, so long as it is not relied upon to negate the at-will relationship. Various courts have recognized that the at-will relationship and the covenant may co-exist. See, e.g., *Mitford v. Laasala*, 666 P.2d 1000, 1006-09 (Alaska 1983); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Magnan v. Anaconda Indus.*, 479 A.2d 781, 785-89 (Conn. 1984); *Gram v. Liberty Mutual Ins. Co.*, 429 N.E.2d 21 (Mass. 1981).